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No. 91-1605

Supreme Court, U.S.
FILED
MAY 5 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

JUAN CONTRERAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence at trial was sufficient to support the jury's finding that the victim of an unlawful detention and sexual assault was an "inhabitant" of the State of Texas within the meaning of 18 U.S.C. 242.

2. Whether the evidence at trial was sufficient to support the jury's finding that petitioner used a firearm "during and in relation to" a crime of violence within the meaning of 18 U.S.C. 924(c)(1).

3. Whether the district court committed plain error in failing to instruct the jury that the charge of attempt requires proof that petitioner's acts were a "substantial step" toward an illegal end.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A51) is reported at 950 F.2d 232.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1991. The petition for a writ of certiorari was filed on March 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of two counts of willfully depriving an inhabitant of Texas of her civil rights, in violation of 18 U.S.C. 242; two counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1); one count of conspiring to tamper with a witness by attempting to kill her, in violation of 18 U.S.C. 371; and one count of tampering with a witness by attempting to kill her, in violation of 18 U.S.C. 1512(a)(1)(C). Petitioner was sentenced to a total of 61 years' imprisonment, to be followed by a three-year term of supervised release, and was ordered to pay a $25,000 fine. The court of appeals affirmed.

1. Petitioner was a police officer in Laredo, Texas. While on duty, petitioner stopped a car containing two persons at about 11:00 p.m. on January 10, 1990. After briefly questioning the male driver, petitioner told him to leave and directed the female passenger to get into petitioner's cruiser. Pet. App. A6.

Petitioner drove to a dark, isolated area, stopped his car, and told his passenger to get out and take off her clothes. Pet. App. A6. When she did not comply, petitioner forcibly opened her blouse, put his revolver on the roof of the cruiser, and demanded that she take her clothes off and lie down on the back seat. Afraid that petitioner might kill or hit her, the woman obeyed. While within reach of his revolver, petitioner proceeded to rape the woman. *Id.* at A6-A7. He then drove her back to town and released her.

The woman reported the incident immediately to the police. Pet. App. A7. The next afternoon, a police officer picked the woman up from her apartment in Laredo, Texas, to view a lineup. *Id.* at A45.

Petitioner was charged in state court with aggravated kidnapping and aggravated sexual assault. Pet. App. A8. A few weeks prior to the trial, petitioner enlisted the assistance of two acquaintances to help him find and kill his victim to prevent her from testifying against him. With the help of those acquaintances, petitioner located a house in the Mexican border city of Nuevo Laredo that he believed belonged to the victim's family. *Id.* at A8-A10.

Five days prior to the trial date, petitioner asked one of his acquaintances to pick him up so that they could go to the victim's family residence "and finish this once and for all." Pet. App. at A10-A11. His friend complied. *Id.* at A11-A12. On the way to the house, petitioner tested a handgun he had brought with him and asked his friend whether he had a mask and gloves. *Id.* at A12.

The FBI arrested petitioner at the border, about a ten-minute drive from the victim's family residence. Inside the truck were bullets and petitioner's handgun. Pet. App. A12.

2. The court of appeals affirmed petitioner's convictions. Pet. App. A3-A51. The court held that the evidence was sufficient to establish that petitioner's victim was an "inhabitant" of the State of Texas within the meaning of 18 U.S.C. 242 even though she was an illegal alien. Pet. App. A44-A47. The court distinguished this case from *United States* v. *Maravilla*, 907 F.2d 216 (1st Cir. 1990), explaining that in this case petitioner's victim was actually living in the United States at the time of the offense. Pet. App. A43-A45. Accordingly, the court concluded that the victim "was not a [*sic*] 'so temporary a foreign visitor' as to preclude a finding of inhabitant status." *Id.* at A44.

The court of appeals also found that the evidence was sufficient to establish that petitioner used a firearm "during and in relation to" the sexual assault, in violation of 18 U.S.C. 924(c)(1). Pet. App. A36-A41. Citing the

legislative history of the statute, the court of appeals noted that Congress "intended section 924(c) to apply to police officers." *Id.* at A37. The court also rejected petitioner's contention that there was an insufficient relationship between the firearm and the underlying offense, explaining (*id.* at A38-A39):

> The jury reasonably could have concluded that [petitioner] was emboldened by his possession of a firearm to assault [the victim], that he displayed the gun in order to intimidate her, and that he had the opportunity and ability to discharge the gun during the entire incident. [The victim] testified that the gun was within [petitioner's] reach during the entire incident and that she believed that he would "kill . . . or hit" her if she tried to escape.

The court of appeals also concluded that the district court did not commit plain error when it failed to instruct the jury that criminal attempt requires proof that petitioner engaged in conduct constituting a "substantial step" toward commission of a crime. Pet. App. A28-A31. As the court explained, "the evidence that [petitioner] 'had taken a substantial step strongly corroborative of his criminal intent was so strong that any error resulting from the district court's omission of the "substantial step" language did not rise to the level of plain error.'" *Id.* at A31 (quoting *United States* v. *Valencia*, 907 F.2d 671, 685 (7th Cir. 1990)).

ARGUMENT

1. Petitioner contends (Pet. 24-28) that the evidence at trial was insufficient to prove beyond a reasonable doubt that his victim was an "inhabitant" of the State of Texas within the meaning of 18 U.S.C. 242. Relying on *United States* v. *Maravilla*, 907 F.2d 216 (1st Cir. 1990), he argues that the government was required to produce "clear evidence of [the victim's] intent to reside or

remain in the United States." Pet. 27-28. Petitioner's claim is without merit.

In *Maravilla*, the victim was a citizen of the Dominican Republic who had traveled to Puerto Rico solely to deposit funds at a bank and had planned to return that same day to the Dominican Republic. 907 F.2d at 217-218. The court of appeals held that a foreign person who visits the United States for no more than a few hours and does not intend to remain even overnight is not an "inhabitant" of the United States within the meaning of 18 U.S.C. 242. 907 F.2d at 224. *Maravilla* did not, however, impose any requirement that the government produce affirmative evidence of a victim's intent to remain indefinitely in the United States in order to establish the "inhabitant" element of the crime.

The instant case is easily distinguishable from *Maravilla*. Here, the victim testified that she lived in Laredo, Texas, at the time of the assault, see Pet. App. A44-A45, and her testimony was corroborated by three other witnesses—a companion who testified that he had picked the victim up at her apartment in Laredo on the afternoon of the incident and was driving her back there when they were stopped by petitioner; a police officer who testified that she picked the victim up from that same apartment the day after the incident to escort her to a lineup; and another police officer who testified that he went to the victim's apartment to confirm that she lived there. *Id.* at A45. The court of appeals therefore correctly found that "there was sufficient evidence from which the jury could conclude that [the victim] was an inhabitant of the United States." *Id.* at A46.[1]

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[1] Petitioner appears to challenge the district court's jury instruction defining "inhabitant." Pet. 25. Petitioner did not challenge that instruction below, however, and should not be permitted

2. Petitioner also argues (Pet. 28-33) that the evidence at trial was insufficient to establish that he used a firearm "during and in relation to" the crime of sexual assault within the meaning of 18 U.S.C. 924(c)(1). Petitioner contends that "the government failed to carry its burden to prove the requisite relationship between the weapon and the alleged sexual assault beyond a reasonable doubt, and the evidence of mere proximity does not establish that the weapon was *an integral part of the felony*." Pet. 33. Petitioner's fact-bound claim is not worthy of review, and in any event is not supported by the record.

Section 924(c)(1) applies to anyone who, "during and in relation to any crime of violence * * *, uses or carries a firearm." The statute's legislative history indicates that the statute was specifically intended to apply to police officers who use their firearms to facilitate the commission of violent crimes:

> [P]ersons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment as a person whose possession of the gun violates a State or local ordinance.

S. Rep. No. 225, 98th Cong., 1st Sess. 314 n.10 (1983).

The "during and in relation to" requirement of Section 924(c)(1) was intended to ensure that there is "some relation or connection between the underlying criminal act and the use or possession of the firearm." *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985); see also *United States* v. *Coburn*, 876 F.2d 372, 375 (5th Cir. 1989). It was intended "to preclude application of the

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to raise the issue for the first time in this Court. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

subsection 'in a situation where [a weapon's] presence played no part in a crime.' " *United States* v. *Hernandez*, 891 F.2d 521, 524 (5th Cir. 1989) (quoting *United States* v. *Wilson*, 884 F.2d 174, 176-177 (5th Cir. 1989)), cert. denied, 495 U.S. 909 (1990); see also S. Rep. No. 225, *supra*, at 314 n.10. "If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge in fact occurred, then there is a violation of the statute." *United States* v. *Stewart*, 779 F.2d at 540. Accordingly, Section 924(c)(1) reaches the possession of a firearm that "facilitate[s] or play[s] a role in the commission" of a crime of violence. *United States* v. *Coburn*, 876 F.2d at 375; see also *United States* v. *LaGuardia*, 774 F.2d 317, 321 (8th Cir. 1985).

In the instant case, the evidence demonstrates that petitioner used his service revolver to embolden himself and intimidate his victim in the course of the sexual assault. The victim testified that immediately prior to the assault, petitioner, while standing next to the back door of his cruiser, placed his firearm on the roof of the car where he could reach it. Pet. App. A7. Believing that petitioner would "kill * * * or hit" her if she tried to resist and "obey[ing petitioner] because of fear," the victim was forced to have intercourse with him. *Ibid.* Moreover, the firearm remained within petitioner's reach during the assault. *Ibid.* Accordingly, the evidence was clearly sufficient to justify a finding that petitioner used his service revolver to facilitate the sexual assault, and thus

petitioner was properly sentenced under 18 U.S.C. 924(c)(1).[2]

3. Petitioner next contends (Pet. 33-36) that the district court committed plain error in failing to instruct the jury that, in order to convict petitioner of attempting to kill his victim, the jury had to find that petitioner engaged in conduct constituting a "substantial step" toward the commission of the crime. That contention was properly rejected by the court of appeals and does not merit further review.

Failure to include "substantial step" language in an attempt instruction does not rise to the level of plain error. See *United States* v. *Valencia*, 907 F.2d 671, 684-685 (7th Cir. 1990); see also *United States* v. *Conway*, 507 F.2d 1047, 1052 (5th Cir. 1975) (finding no plain error in instruction essentially identical to that given by the district court in this case). Although the Ninth Circuit held in *United States* v. *Taylor*, 716 F.2d 701, 711-712 (1983), that a district court's failure to include "substantial step" terminology in an attempt instruction constituted error, in that case the defendant objected to the instruction at trial. Accordingly, the court did not resolve the plain-error question presented here. Petitioner has failed to identify any court of appeals decision holding that an instruction like the one at issue in this case constitutes plain error, and we are aware of none. Review by this Court is therefore not warranted.

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[2] Without citation of authority, petitioner also asserts (Pet. 33) that "the trial court's instruction [regarding 18 U.S.C. 924(c)(1)] was inadequate to protect his constitutionally secured right to due process under the [Fifth] Amendment." Since petitioner did not make that claim in the courts below, he is precluded from raising it now. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. at 147 n.2. At any rate, the district court's instructions correctly stated the law. See Pet. App. A63, A70.

In any event, the district court's failure to instruct the jury on the "substantial step" requirement could not have amounted to plain error on this record, because any error was "not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *United States* v. *Young*, 470 U.S. 1, 16 (1985). As the court of appeals found, no reasonable juror could have believed the government's evidence and nevertheless have found that petitioner's conduct did not constitute a "substantial step" toward committing the crime. Pet. App. A30-A31. The evidence showed that petitioner was arrested ten minutes from what he believed to be his victim's residence, in possession of a gun and bullets, while on his way to kill his victim. *Id.* at A12. Since petitioner's conduct went well beyond mere preparation to kill the victim, the court's failure to include a reference to the "substantial step" requirement in the attempt instruction could not have affected the jury's verdict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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